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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

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JAMES H. McKENNEY,
Clerk

AH HOW, ALIAS LOUIE AH HOW, APPELLANT,
v.
THE UNITED STATES. } No. 307.

CHU DO, ALIAS CHU GEE, APPELLANT,
v.
THE UNITED STATES. } No. 308.

LEW GUEY, APPELLANT,
v.
THE UNITED STATES. } No. 309.

TOM HONG, ALIAS HOM POE, APPELLANT,
v.
THE UNITED STATES. } No. 310.

TOM DOCK, ALIAS HOM DOCK, APPELLANT,
v.
THE UNITED STATES. } No. 311.

YUNG LEE, APPELLANT,
v.
THE UNITED STATES. } No. 312.

LEE KIT, APPELLANT,
v.
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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES UPON THE MERITS.

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It is respectfully submitted that these appeals should be dismissed or the judgments below

affirmed upon the motions and brief heretofore presented by the Government. Since, however, the court desires further to consider the cases on their merits, I proceed, while not admitting the existence of any real merits in these appeals except in the technical sense of the word, to consideration of the claims involved.

I desire to submit, with great earnestness, the conviction of the Government that the legal exigencies of these cases, and of Chinese-exclusion cases in general, fairly demand that the preliminary motions should be determined, and that the issues should not be disposed of solely on the merits.

These Chinamen were arrested in various Brooklyn laundries as laborers unlawfully in the United States, being without the certificate of registration required by section 6 of the act of May 5, 1892 (27 Stat., 25), as amended by the act of November 3, 1893 (28 Stat., 7). It was not attempted to deny that at the time of arrest these men were laborers, but it was claimed in four of the cases (Ah How, Tom Hong, Tom Dock, and Lee Kit) that at the time of the passage of the acts cited, and for varying periods of time thereafter, they were merchants; in two cases (Chu Do and Lew Guey) the claim was of birth in the United States; and in the remaining case of Yung Lee it was asserted that the Chinaman had been unable to procure a certificate on account of illness.

In three of the "merchant" cases the Chinamen claimed to have been members of the same firm. The testimony in these cases was substantially similar; indeed, in one of them it was stipulated that if the witnesses were called they would testify in that case as they had testified in the previous cases (Tom Hong rec., p. 9). These witnesses, one a collector of rents and the other a truckman, stated in each case that they had known the Chinaman for some years as a member of a particular firm; had seen him there selling goods; were told that he was a member of the firm by other Chinamen connected with the establishment; witnesses did not know in any other way. (Tom Dock, Rec., pp. 10, 13, 16; Lee Kit, Rec., pp. 5, 6, 9.) In the case of Ah How, defendant stated that he was paid wages of $30 a month for working in the store of the firm of which he claimed to be a member; he had no money interest in the firm (Ah How, Rec., p. 6); and another Chinaman testified that he did bookkeeping for the firm (Tom Dock, Rec., p. 7). Defendants all admitted that except for the period covered by their alleged partnership in the mercantile firm they had been engaged in laundry work or other occupation as laborers during their stay in the United States.

In the case of Chu Do the claim of citizenship appears to have been an afterthought. On the first hearing before the commissioner, counsel for the Chinaman moved for his discharge on the

ground, among others common to all the cases, that the Government had failed to make out a case; that it was bound to offer proof that during the years 1892 and 1893 defendant was in the United States and was a Chinese laborer at that time; which motion was denied. (Chu Do, Rec., p. 10.) On the date set for the next hearing counsel obtained an adjournment in order to produce the "father" of the Chinaman, who was asserted to be ill. Further adjournments were had for the same reason, and finally not the father but an "uncle" was produced, who testified that Chu Do was his nephew, was born in San Francisco twenty-six years before, and that he saw him there as an infant (pp. 11, 12). When questioned as to his knowledge of persons and occurrences in San Francisco about that time, witness showed lack of memory, and seemed unable to recall any matter other than the fact of his nephew's birth (p. 16). Chu Do himself offered no testimony.

The claim of citizenship in the case of Lew Guey rested on the Chinaman's oral testimony, and the production of a certificate or copy of docket entries of former Commissioner McGettrick, of Richford, Vt., to the effect that a Chinaman by the name of Lew Guey had been before him in June, 1897, charged with being unlawfully in the United States, and had been discharged "as being a citizen of the United States." The Government objected to the admission of this certificate as in no

sense proving the judgment alleged to have been rendered, and the certificate was finally admitted merely "as showing a hearing before Commissioner McGettrick on the date named in the case of a man by the name of Lew Guey." (Lew Guey, Rec., pp. 9, 10.)

In the case of Yung Lee, defendant claimed that he was ill during the extension of the period within which he was entitled under the acts of 1892 and 1893 to obtain a certificate. His statements were partially corroborated by the same witness who testified in the case of Ah How, who declared that he knew of the illness of defendant, saw him in bed, etc. This witness was unable to state the nature or duration of the indisposition. (Yung Lee, Rec., pp. 5–7.)

The commissioner ordered deportation in all these cases; the orders were affirmed by the district court upon appeal, and thereafter appeals were allowed to this court.

The assignments of error are practically the same in all the cases, and raise no question that has not already been conclusively determined by this court. Those filed in the district court included certain complaints, which have since apparently been abandoned, as, for instance, that the defendants had been arrested without a warrant, and that sections 1046 and 1047, Revised Statutes, operated as a bar to the offense. I have noticed these points fully in the motions already filed.

The errors now assigned present the objection of want of jurisdiction because of the insufficiency of the complaints, and allege that the provisions of the act of May 5, 1892, as amended by the act of 1893, have been repealed by the act of April 29, 1902.

As to any irregularity in the complaints, if such existed, which is not conceded, it was fully cured by the subsequent proceedings. In the case of *Chin Bak Kan* v. *United States* (186 U. S., 193), the Chief Justice, applying the ruling in *Fong Yue Ting* v. *United States* (149 U. S., 729), held that "defects in such complaints or pleadings do not affect the authority of the commissioner or judge or the validity of the statute." (And see also *Chow Loy* v. *United States*, 112 Fed. Rep., 354, 361, citing *Nishimura Ekiu* v. *United States*, 142 U. S., 651, 662.)

The act of April 29, 1902 (32 Stat., 176), has not yet been before the court; but that law expressly reenacts and continues all previous laws on the subject then in force and not inconsistent with treaty obligations (specifically including certain doubtful sections of the act of September 13, 1888); and this court has twice held, the acts of 1892 and 1893 being under consideration, that the treaty of 1894 did *not* repeal existing law. (*United States* v. *Lee Yen Tai*, 185 U. S., 213; *Chin Bak Kan* v. *United States*, *supra*.)

In considering the proceedings before the United States commissioner in these cases it is impossible

to avoid the conclusion that the character of the testimony was for the most part perfunctory and formal; that it utterly failed to support with any conclusiveness either the claim of merchant status or that of citizenship, and amply justified the commissioner's orders of deportation, and his finding as to the merchant claim that the proofs furnished did not "clearly establish facts which would bring these persons within the statute as merchants." When all the circumstances are considered—the arrest of these Chinese laborers in various Brooklyn laundries, three of them claiming to have been members of the same mercantile firm at the same time for the same term of years in New York City, the alleged existence of this firm for but a few years, the Chinamen's admissions that they had been engaged in laundry work from the time of their arrival in this country to the time of their asserted membership in the merchant firm, and that they resumed the laborer status immediately upon the dissolution of the partnership, the validity of their claim appears to be, to say the least, very doubtful.

The term "merchant," as it is used in Chinese exclusion legislation, has been clearly defined by the law and by the decisions of the courts (sec. 2, act of Nov. 3, 1893; *In re Ah Yow*, 59 Fed. Rep., 561; *Lai Moy* v. *United States*, 77 Fed. Rep., 955; *Mar Bing Guey* v. *United States*, 97 Fed. Rep., 576), and has expressly been held not to include bookkeepers and paid assistants in a store (*United*

States v. *Pin Kwan*, 100 Fed. Rep., 609); such persons are either actually or constructively laborers.

The evidence upon which the claim of citizenship rests must also be regarded as wholly inconclusive to show birth in this country, under the decisions of this court and of the lower Federal courts. In *Quock Ting* v. *United States* (140 U. S., 417), where the uncontradicted testimony of the Chinaman and his father was held to be insufficient as amounting to little more than a mere statement of the fact, the court, speaking by Mr. Justice Field, said (pp. 419, 420):

> The testimony given by the petitioner amounted to very little; indeed, it was of no force or weight whatever. The particularity and positiveness with which he stated the place of his birth in San Francisco was evidently the result of instruction for his examination on this proceeding, and not a statement of what he had learned from his parents in years past. * * * The testimony of the father was also devoid of any incident or circumstance corroborative of his statement. * * * It is incredible that a father would allow the exclusion of his son from the country where he lived, when proof of his son's birth and residence there for years could have been easily shown, if such in truth had been the fact.

The court undoubtedly took the same view in the *Chin Bak Kan* case when it referred to the

"mere assertion of citizenship" which "is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency without being able to show that it was ever possessed" (186 U. S., at p. 200).

In *In re Louie You* (97 Fed. Rep., 580), where petitioner claimed to have been born in the United States and to have left the country with his father when 3 years of age, remaining away for sixteen years, three Chinese witnesses corroborating the testimony, the court said:

> I am not willing to establish the precedent of admitting Chinese persons, who have admittedly remained out of the country for so great a length of time. * * * Those who leave the country when infants must not expect to gain ready readmission after they have, in effect, reached maturity. If satisfactory proof of their right to land is not possible in such a case, the fault is theirs. The difficulty is one easily foreseen.

In *United States* v. *Lee Huen* (118 Fed. Rep., 458) Judge Ray, discussing the requirements as to evidence in cases involving the issue of citizenship of a person of Chinese descent, observed that the burden of *proof*, not of evidence merely, is on the defendant; and it was held in that case that evidence from a male person not the father that the defendant was born at a certain time and place in the United States, unaccompanied by any details as to how or why the witness knows such

fact, is not conclusive on the commissioners or court. (See also *In re* Jew Wong Loy, 91 Fed. Rep., 240.)

So, in the light of those decisions, the testimony offered in these cases to show birth within the country is, I submit, inconclusive and unsatisfactory. It amounts to nothing more than mere assertions of the fact, unaccompanied by any corroborative incidents or circumstances, and, in the case of the "uncle's" testimony, lacking in details showing how the witness knew such fact.

It can not be doubted that a commissioner properly and finally passes upon the claim of birth in this country, a claim of fact, as well as upon all other facts. That was expressly decided in Chin Bak Kan's case (186 U. S., at p. 200). It has lately been held that the executive officers at the frontier conclusively pass upon the citizenship claim under their exclusive jurisdiction over the admission of aliens (decisions of Judge Wheeler in the district of Vermont and of Judge Ray in the northern district of New York, not yet reported, but heretofore called to the attention of the court).

As to the McGettrick certificate in the *Lew Guey* case, I repeat that the fraudulent use of such certificates has become notorious; that they have been and still are the subject of widespread barter and sale is well known. But even if genuine the certificate was not properly admissible as evidence. In the case of *United States* v. *Lew Poy Dew* (119

Fed. Rep., 786), where the question at issue was as to the admissibility in evidence of one of these certificates (the wording of which was almost identical with that of the certificate offered in the Lew Guey case), Judge Ray, of the northern district of New York, held that the certificate was not admissible in evidence for any purpose. The learned judge said:

> This certificate is not, and does not purport to be, the judgment or decision of the United States commissioner, Felix W. McGettrick, or a copy thereof. It is a mere recital of certain alleged official acts or transactions of McGettrick as United States commissioner, and of certain proceedings alleged to have been had before him. It * * * is equivalent to a written statement, made and signed by the judge of a court, that he had at a certain time adjudged and determined that certain facts did or did not exist, and had given judgment accordingly. This certificate does not purport to be a copy or a transcript of any decision made, or of any judgment rendered, in any legal proceeding. It is not a certificate authorized by any law, and therefore not an an official act of said commissioner. It is * * * merely a roving general certificate, and is no more evidence in a court of justice to establish the facts recited than would be a letter from the clerk of a court to the complainant in an action that he had entered a judgment, reciting its terms, in his favor on a certain day. * * * No more

> loose, dangerous, and unsatisfactory mode of proving the judgment of a court could be devised than to permit the introduction in evidence, against objection, of the mere unsworn statement of a commissioner that he has made a certain adjudication, when there is no statute making it his duty to make such a certificate. * * * Evidence was given that this man McGettrick was engaged in the business of making and selling such certificates. * * * The commissioner was neither required nor authorized to make this certificate. * * * Clearly it is not evidence or admissible for any purpose.

It is contended that in any event the appellants here claiming citizenship were not subject to deportation for failing to register, since they were minors at the time of the passage of the act of 1893; and, accordingly, having no occupation of their own, could not be regarded as laborers. Counsel cite the case of *Gue Lim* v. *United States* (176 U. S., 459), but that decision, which held that the minor children of a Chinese merchant domiciled in this country may enter without certificates, is not at all applicable to the case of the minor children of a Chinaman who is not a member of the privileged classes, in which category (i. e., of laborers) the fathers of these appellants may be presumed to be in the absence of anything appearing in the records to the contrary. Under the ruling of the commissioner, affirmed by the

district court, appellants were found not to have proved their assertion of American birth. It is undisputed that they are laborers. If they were not born in this country, then, not being the children of domiciled Chinese merchants, they must, whether as minors or otherwise, have entered the United States unlawfully, and are therefore not entitled to remain.

Counsel also contend that in the *Yung Lee* case the commissioner erred in declining to make an order for the issuance of a registration certificate, as provided in section 6 of the act of 1892 as amended by the act of 1893. But the evidence offered in this case was not such as to establish clearly to the satisfaction of the commissioner that Yung Lee was "unable through sickness during all the time given by the statute to obtain a certificate of residence" (Yung Lee, rec., p. 19), and he was very properly adjudged to be unlawfully in the United States.

It is submitted that from the foregoing, and from the motions and reply brief filed for the Government herein, it clearly appears that these appeals are unfounded and without merit; that they raise no new or important questions for consideration, but are based on assignments of error which embrace propositions already conclusively and authoritatively determined by this court. I therefore respectfully submit that the Government's contentions should be upheld, and these appeals forthwith

dismissed (as the preferable course), or, as an alternative, that the judgments below be affirmed; and that, as a preliminary to either result, the orders admitting to bail should be vacated.

HENRY M. HOYT,
Solicitor-General.

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